

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS Patent Research Institute, L.L.C.	DEFENDANTS The Clorox Company, The Kingsford Products Company, Kingsford Manufacturing Company
(b) County of Residence of First Listed Plaintiff <u>Harris County, TX</u> (EXCEPT IN U.S. PLAINTIFF CASES)	County of Residence of First Listed Defendant _____ (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.
(c) Attorney's (Firm Name, Address, and Telephone Number) Nelkin & Nelkin 713-526-4500 5417 Chaucer Houston, TX 77005	Attorneys (If Known) _____

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)	III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)																								
<input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 2 U.S. Government Defendant <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	<table style="width: 100%;"> <tr> <th></th> <th>PTF</th> <th>DEF</th> <th></th> <th>PTF</th> <th>DEF</th> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

IV. NATURE OF SUIT (Place an "X" in One Box Only)				
CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	TORTS PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	FORFEITURE/PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input checked="" type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN (Place an "X" in One Box Only)							Appeal to District Judge from Magistrate Judgment
<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7	

VI. CAUSE OF ACTION	Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): <u>35 U.S.C. Section 292</u> Brief description of cause: <u>qui tam action for false marking of patent</u>
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VII. REQUESTED IN COMPLAINT:	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND \$	CHECK YES only if demanded in complaint: JURY DEMAND: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
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VIII. RELATED CASE(S) IF ANY	(See instructions): JUDGE _____ DOCKET NUMBER _____
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DATE 03/08/2011	SIGNATURE OF ATTORNEY OF RECORD /s/ Stuart M. Nelkin
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FOR OFFICE USE ONLY	RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____
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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

PATENT RESEARCH INSTITUTE, L.L.C. §

Plaintiff, §

v. §

**THE CLOROX COMPANY, THE
KINGSFORD PRODUCTS COMPANY,
LLC, AND KINGSFORD
MANUFACTURING COMPANY** §

Defendants. §

Civil Action No. 2:11-cv-00149

JURY TRIAL DEMANDED

COMPLAINT

I. NATURE OF THE CASE

1. This is an action for false patent marking under Section 292 of the Patent Act (35 U.S.C. § 292), which provides that any person may sue to recover the civil penalty for false patent marking. Plaintiff Patent Research Institute, L.L.C. brings this *qui tam* action on behalf of the United States of America against Defendants, The Clorox Company, The Kingsford Products Company, LLC, and Kingsford Manufacturing Company, (collectively “Defendants”).

II. PARTIES

2. Plaintiff Patent Research Institute, L.L.C. is a Texas limited liability company with its principal place of business in Houston, Texas.

3. Defendant The Clorox Company is a Delaware limited liability company having its principal place of business at 1221 Broadway, Oakland, California, 94612-1888.

4. Defendant The Kingsford Products Company, LLC is a Delaware limited liability

company having its principal place of business at 1221 Broadway, Oakland, California, 94612-1888.

5. Defendant Kingsford Manufacturing Company is a Delaware limited liability company having its principal place of business at 1221 Broadway, Oakland, California, 94612-1888.

III. JURISDICTION AND VENUE

6. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1338(a).

7. The Court has personal jurisdiction over Defendants. Defendants have continuously conducted business within the State of Texas. Defendants have continuously offered for sale and sold, marked, and advertised the products that are the subject of this Complaint in the United States, the State of Texas, and the Eastern District of Texas.

8. Venue is proper in this district under 28 U.S.C. §§ 1391(b), 1391(c), and 1395(a).

IV. FACTS

9. Defendants have marked and continue to mark their products, including their Kingsford Charcoal products, (the “Falsely Marked Products”), with inapplicable patents, including U.S. Patents Nos. D389,453 and D517,005, (the “Falsely Marked Patents”). Defendants have also improperly placed the terms “patent pending” and “patents pending” on the Falsely Marked Products despite having no pending patents that were applicable to the Falsely Marked Products. Such false marking by Defendants includes (a) marking the Falsely Marked Patents and placing the inapplicable terms “patent pending” or “patents pending” upon the Falsely Marked Products, (b) affixing the Falsely Marked Patents and inapplicable terms “patent pending” or “patents pending” to the Falsely Marked Products

and (c) using the inapplicable terms “patent pending” or “patents pending” in advertising in connection with the Falsely Marked Products.

10. U.S. Patents Nos. D389,453 (attached hereto as Exhibit 1) and D517,005 (attached hereto as Exhibit 2) have no application to the Falsely Marked Products. These patents are design patents that disclose certain design characteristics that the Falsely Marked Products lack. For example, Patent No. D389,453 covers charcoal briquettes that have a smooth bottom while the Falsely Marked Products have grooved bottoms that are characterized by diagonal grooves. Similarly, Patent No. D517,005 covers charcoal briquettes that are indented at various points and have a series of grooves that are either parallel or perpendicular to one or more of the briquettes’ edges. In contrast, the Falsely Marked Products are not indented in the manner disclosed in Patent No. D517,005 and possess diagonal grooves as opposed to the parallel/perpendicular grooves disclosed in Patent No. D517,005. In addition, the Falsely Marked Products bear a K shaped groove that the Patent No. D517,005 design does not cover.

11. There are no patents that are applicable to the Falsely Marked Products and no pending patent covers the Falsely Marked Products.

12. It was a false statement for Defendants to mark the Falsely Marked Products with inapplicable patents. It was also a false statement for Defendants to mark the Falsely Marked Products with the inapplicable terms “patent pending” and “patents pending.”

13. Defendants are large, sophisticated companies.

14. Defendants have, and/or regularly retain, sophisticated legal counsel.

15. Defendants have many years of experience applying for patents, obtaining patents, licensing patents, and litigating patent infringement lawsuits.

16. Defendants acknowledge in regulatory filings with the federal government that their patents are “material” to their business. Defendants acknowledge that they utilize patents to protect their brand, products and product packaging and that patents are of material importance to Defendant’s financial condition, operating results and competitiveness.

17. Defendants knew that the Falsely Marked Products were not covered by the Falsely Marked Patents or any pending patent application.

18. Defendants knew that it was a false statement to mark the Falsely Marked Products with inapplicable patents or inapplicable terms such as “patent pending” and “patents pending.” Defendants also acknowledge in their regulatory filings the possibility that they will be found to have improperly asserted patent rights in the future and that if that occurs they could suffer material consequences and incur significant costs in connection with legal actions related to such improper assertions of patent rights.

V. INJURY IN FACT TO THE UNITED STATES

19. Defendants' false marking has injured the United States and continues to do so.

20. Defendants' false marking has caused injuries to the sovereignty of the United States arising from Defendants' violations of federal law, specifically, Defendants' violations of 35 U.S.C. § 292(a).

21. Defendants' false marking has caused proprietary injuries to the United States and continues to do so.

22. The marking and false marking statutes exist to give the public notice of patent rights. Congress intended the public to rely on marking as a ready means of discerning the status of intellectual property embodied in an article of manufacture or design, such as the

Falsely Marked Products.

23. Federal patent policy recognizes an important public interest in permitting full and free competition in the use of ideas which are, in reality, a part of the public domain-such as those described in the Falsely Marked Patents.

24. Congressional interest in preventing false marking was so great that Congress enacted 35 U.S.C. §292(a) which seeks to encourage private parties to enforce the statute. By permitting members of the public to bring *qui tam* suits on behalf of the Government, Congress authorized private persons such as Plaintiff to help control false marking.

25. Defendants' acts of false marking deter innovation and stifle competition in the marketplace for the following reasons: (a) if an article that is within the public domain is falsely marked, potential competitors may be dissuaded from entering the same market; (b) false marks may also deter scientific research when an inventor sees a mark and decides to forego continued research to avoid possible infringement; and (c) false marking can cause unnecessary investment in design to avoid presumed patent infringement or costs incurred to analyze the validity or enforceability of a patent whose number has been marked upon a product with which a competitor would like to compete.

26. Defendants' false marking misleads the public into believing that the Falsely Marked Patents give Defendants control of the Falsely Marked Products, and places the risk of determining whether the Falsely Marked Products are controlled by such patents on the public rather than on Defendants, thereby increasing the cost to the public of ascertaining whether Defendants in fact control the intellectual property embodied in the Falsely Marked Products.

27. In each instance where Defendants have represented that the Falsely Marked

Products are protected by the Falsely Marked Patents, a member of the public desiring to participate in the market for products similar to the Falsely Marked Products must incur the cost of determining whether the involved Falsely Marked Patents are valid and enforceable. Failure to take on the costs of a reasonably competent search for information necessary to interpret each Falsely Marked Patent, investigation into prior art and other information bearing on the quality of the patents, and analysis thereof can result in a finding of willful infringement, which may treble the damages a potential infringer would otherwise have to pay.

28. Defendants' false marking also creates a misleading impression that the Falsely Marked Products are technologically superior to other available products, as articles bearing the term "patent" may be presumed to be novel, useful, and innovative.

29. Every person or company in the United States is a potential entrepreneur with respect to the process, manufacture, or composition of matter described in the Falsely Marked Patents. Moreover, every person or company in the United States is a potential competitor of Defendants with respect to the Falsely Marked Products marked with the Falsely Marked Patents.

30. Each Falsely Marked Product and advertisement thereof is likely to discourage or deter members of the public from commercializing a competing product even though the Falsely Marked Patents have no legal authority to prevent any person or company in the United States from competing with Defendants in commercializing such products.

31. Defendants' marking of the Falsely Marked Products and advertising thereof may stifle competition with respect to similar products to an immeasurable extent, thereby causing harm to the United States in an amount that cannot be readily determined.

32. Defendants have wrongfully and illegally advertised a patent monopoly that they do not possess and, as a result, have benefited by increasing or maintaining their market power or commercial success with respect to the Falsely Marked Products.

33. Each individual false marking (including each time an advertisement with such marking is accessed on the internet), is likely to harm the public. Thus, each such false marking is a separate offense under 35 U.S.C. § 292(a).

34. Each offense of false marking creates a proprietary interest of the United States in the penalty that may be recovered under 35 U.S.C. § 292(b).

35. For the reasons stated in paragraphs 9 through 34 above, Defendants' false marking has caused injuries to the sovereignty of the United States arising from Defendants' violations of federal law, and has caused proprietary injuries to the United States.

VI. CLAIM

36. For the reasons stated in paragraphs 9 through 35 above, Defendants have violated 35 U.S.C. § 292 by falsely marking the Falsely Marked Products with intent to deceive the public.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following:

- A. An accounting of the number, sales, and revenue of any Falsely Marked Products;
- B. A Judgment in favor of Plaintiff finding that Defendants have falsely marked products in violation of 35 U.S.C. § 292 and imposing a civil fine of \$500 per each Falsely Marked Product and false marking offense or an alternative amount, as set by the Court, one-half of any such award to be paid to the United States;
- C. An award of pre-judgment and post-judgment interest on any monetary award;

- D. An injunction prohibiting Defendants and their officers, directors, agents, servants, employees, attorneys, licensees, successors, and assigns, and those in active concert or participation with any of them from violating 35 U.S.C. § 292;
- E. An award of attorneys fees and costs, and other expenses and an enhancement of damages and penalties; and
- F. Such other and further relief to which Plaintiff is entitled.

JURY DEMAND

Plaintiff demands a jury trial on all issues so triable.

Dated: March 8, 2011

Respectfully submitted,

/s/ Stuart M. Nelkin
Stuart M. Nelkin
Texas Bar No. 14884000
Carol Nelkin
Texas SBN: 14883500
Jay P. Nelkin
(Pro Hac Vice Motion to be
filed)
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